

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
February 10, 2009 Session

**STATE OF TENNESSEE v. JESSICA MYRICK**

**Direct Appeal from the Circuit Court for Franklin County  
No. 17713-A J. Curtis Smith, Judge**

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**No. M2008-00775-CCA-R3-CD - Filed April 21, 2009**

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Defendant, Jessica Myrick, entered a plea of guilty to possession of cocaine, a Class C felony and was sentenced as a Range I, standard offender, to three years suspended after service of ninety days in confinement. The plea agreement purported to reserve a certified question of law under Rule 37(b)(2)(A) of the Tennessee Rules of Criminal Procedure which challenged the trial court's denial of her motion to suppress. After a thorough review, we conclude that Defendant has failed to comply with the strict requirements of Rule 37(b)(2)(A) and dismiss this appeal.

**Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

David L. Stewart, Winchester, Tennessee, for the appellant, Jessica Myrick.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steven M. Blount, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Background**

On May 1, 2007, Sergeant Danny Mantooth of the Winchester Police Department obtained a search warrant for Defendant's residence. The affidavit in support of the search warrant provided as follows:

I, Sgt. Danny Mantooth[,] the affiant of this search warrant[,] have received information from an informant who has proven himself/herself reliable by giving the affiant information that has [led] to the arrest of two persons for possession of marijuana and the arrest of one person in possession of methamphetamine. The CI

stated to the affiant that he/she was at the residence of [Defendant] located at 208 South Vine Street in the last 48 hours and while there saw [Defendant] and a black male whose name is unknown to the CI in possession of crack cocaine. The CI stated that while there he/she saw [Defendant] sell crack cocaine to a white female. I have known the CI for approximately four (4) years and the CI has admitted to the affiant that he/she has used crack cocaine in the past and knows what crack cocaine looks like. In the last 24 hours I set up surveillance at the residence and saw several vehicles pull up to the residence and persons go into the residence and stay a short while and then leave.

A search of Defendant's residence revealed several off-white rocks of cocaine, one pair of scales, a large amount of cash, and assorted pills. Defendant was indicted for the manufacture of cocaine, possession of 0.5 grams or more of cocaine with the intent to sell, and possession of drug paraphernalia. Defendant filed a motion to suppress the items seized during a search of her residence, arguing that the affidavit of the investigating officer failed to establish probable cause for the issuance of the search warrant. Specifically, Defendant argued that the affidavit failed to provide adequate information to establish the reliability or credibility of the criminal informant. Following a hearing, the trial court denied Defendant's motion to suppress.

Thereafter, on March 6, 2008, Defendant entered into a negotiated plea agreement under Rule 11(e) of the Tennessee Rules of Criminal Procedure, in which she pled guilty to one count of possession of cocaine. The plea agreement contained a notation incorporating a document, also dated March 6, 2008, which set forth the following certified question of law:

Whether the Trial Court erred in finding that the search warrant sufficiently established the credibility of the criminal informant in order to establish probable cause for issuance of the warrant.

The document provides that the certified question of law was reserved with the consent of the State and the trial court, and that Defendant, the State, and the trial court were of the opinion that the certified question of law is dispositive of the case.

A sentencing hearing was conducted on June 10, 2008, the transcript of which is not in the record. According to the standardized judgment form utilized by the trial court, Defendant was sentenced to three years for her Class C felony conviction, which was suspended after service of ninety days in confinement. The judgment of conviction, which was not entered until June 10, 2008, makes no reference to the reservation of a certified question of law as reflected in Defendant's plea agreement form dated March 6, 2008, nor does it incorporate the document attached to the plea agreement form. The judgment does provide that Defendant will remain in custody until she posts a "bond for the appeal." However, because the plea agreement did not include an agreed upon sentence, the reference to an "appeal" on the judgment form could reflect an appeal as to the manner of service of Defendant's sentence. Also, although not required to do so, the judgment form contains a notation that a copy of the judgment form was forwarded to Defendant's counsel which provided

the opportunity for moving the trial court to add language to the judgment referencing the certified question reflected in the March 6, 2008, document.

Rule 37(b)(2)(A) of the Tennessee Rules of Criminal Procedure provides that a defendant may appeal from any judgment of conviction occurring as a result of a guilty plea if the following requirements are met:

- (i) The judgment of conviction, or other document to which such judgment refers that is filed before the notice of appeal, must contain a statement of the certified question of law reserved by defendant for appellate review;
- (ii) The question of law must be stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved;
- (iii) The judgment or document reflects that the certified question was expressly reserved with the consent of the state and the trial judge; and
- (iv) The judgment or document reflects that the defendant, the state, and the trial judge are of the opinion that the certified question is dispositive of the case.

See also State v. Armstrong, 126 S.W.3d 908, 912 (Tenn. 2003); State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988).

Additionally, in Preston, our supreme court explicitly provided prerequisites to appellate consideration of a certified question of law under Rule 37(b)(2)(A), stating:

[r]egardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved.

Preston, 759 S.W.2d at 650. It is permissible to comply with these requirements in a separate document if such document is clearly referred to or incorporated by reference into the judgment. State v. Irwin, 962 S.W.2d 477, 479 (Tenn. 1998). However, the defendant bears the burden of insuring that the prerequisites are in the final order. Armstrong, 126 S.W.3d at 911 (citing Preston, 759 S.W.2d at 650). Substantial compliance with Preston is not sufficient to acquire appellate review of the certified question. Armstrong, 126 S.W.3d at 912.

This Court has consistently and repeatedly held that the Preston requirements are jurisdictional. State v. Long, 159 S.W.3d 885, 887 (Tenn. Crim. App. 2004); State v. Faith Whitley, No. W2006-02595-CCA-R3-CD, 2008 WL 450617, at \*3 (Tenn. Crim. App., at Jackson, Feb. 19, 2008), no perm. to appeal filed (internal citations omitted). The failure to refer to or incorporate the

certified question in the final judgment of conviction deprives this Court of jurisdiction to review Defendant's certified question on the merits. As the Whitley court concluded, "we cannot assume jurisdiction where it is denied due to failures in meeting the strict prerequisites" of Preston and Rule 37(b)(2)(A). Faith Whitley, 2008 WL 450617, at \*3.

Having said that, we note the dilemma that may be faced by defense counsel when attempting to comply with the procedural requirements for appealing from the entry of a plea of guilty involving a certified question of law. Rule 37 of the Tennessee Rules of Criminal Procedure and the applicable case law require defense counsel to include certain provisions in the judgment from which the appeal is taken – either the certified question itself with all required information or a specific reference to the document setting forth the certified question.

However, there is absolutely no definitive right of defense counsel to have any input as to the language used in the judgment. Tennessee Code Annotated section 40-35-209(e)(1) provides that "the district attorney general shall complete the uniform judgment document for the conviction . . ." (emphasis added) and lists the precise information which must be reflected on each judgment. Pursuant to our legislature's mandate in Tennessee Code Annotated section 40-35-209(e)(1), our supreme court adopted a uniform judgment form in Rule 17 of the Rules of the Supreme Court of Tennessee. The signature of either defense counsel or the defendant is merely "optional." There is no statutory or case law requirement that a copy of the judgment even be provided to the defendant or defense counsel before it is entered and enforceable. All that has to be done for the entry of a criminal case judgment is for the judgment of conviction to be signed by the trial judge and then entered by the clerk. Tenn. R. Crim. P. 32(e)(1).

We cannot alter the requirements for preserving a certified question of law for appeal set forth by our legislature in statutes or by our supreme court in rules and case law. Defense counsel must be diligent and hope that the trial court and the district attorney general cooperate to make sure that a defendant's interests are protected in the appeal of a certified question of law. Unfortunately, defendants and their counsel have been given responsibilities without an efficient manner of fulfilling them, and without an absolute right to approve the form of a judgment before it is entered.

## **CONCLUSION**

Based on the foregoing reasons, we conclude that the proposed certified question was not properly reserved for appellate review. Accordingly, we dismiss the appeal.

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THOMAS T. WOODALL, JUDGE